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QUESTION PRESENTED

1. Whether it is constitutional for a state to require a criminal defendant to sustain his claim of incompetency by clear and convincing evidence.

SUBJECT INDEX

Page

QUESTION PRESENTED ii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

HISTORICAL FACTS REGARDING COMPETENCY 3

SUMMARY OF THE ARGUMENT 12

I. THE CONSTITUTION PROTECTS A CRIMINAL DEFENDANT FROM BEING TRIED WHILE INCOMPETENT; THE DUE PROCESS PROVIDED TO DETERMINE INCOMPETENCE IS LEFT TO THE STATES 13

A. THE INCREASED PROTECTIONS AFFORDED CRIMINAL DEFENDANTS IN COMPETENCY 21

B. OKLAHOMA'S CLEAR AND CONVINCING STANDARD ALLOCATES THE RISK OF ERROR TO REFLECT SOCIETAL VALUES 25

C. THE CLEAR AND CONVINCING STANDARD IS NOT SO HIGH AS TO VIOLATE DUE PROCESS 32

II. ALTHOUGH CAPITAL CASES ARE DIFFERENT IN CERTAIN RESPECTS, THIS COURT HAS NOT PROVIDED THAT CAPITAL CASES ARE ENTITLED TO THEIR OWN SET OF PROCEDURAL RULES, INDEPENDENT OF PUNISHMENT ISSUES 37

III. STATES ARE FREE TO ADOPT THEIR OWN STANDARDS OF PROOF CONSISTENT WITH THEIR OWN CONCEPTS OF PUBLIC POLICY AND FAIRNESS 39

CASES

Page

Addington v. Texas, 441 U.S. 418
(1979) 14, 18, 19, 25, 28, 29,31, 34, 39

Ake v. Oklahoma, 470 U.S. 68 (1985) 22

Barker v. Wingo, 407 U.S. 514
(1972) 30

Boyde v. California, 494 U.S. 370,
y110 S. Ct. 1190, 108 L. Ed. 2d 316
(1990) 38

Burnham v. Superior Court of California,
495 U.S. 604 (1990) 21, 23

California v. Ramos, 463 U.S. 992
(1983) 37

Cooper v. State, 889 P.2d 293
(Okla. Crim. App. 1995) 2

Costello v. United States, 365 U.S. 265
(1961) 30

Cruzan v. Director, Missouri Department
of Health, 497 U.S. 261 (1990) 26

Drope v. Missouri, 420 U.S. 162
(1975) 13, 17, 28

Dusky v. United States, 362 U.S. 402
(1960) 18

Estelle v. McGuire, 502 U.S. 62
(1991) 39

Fisher v. United States, 328 U.S. 463
(1946) 23

Foucha v. Louisiana, 504 U.S. 71
(1992) 26

Gomez v. Toledo, 446 U.S. 635
(1980) 26

Herrera v. Collins, 506 U.S. ___, 113
S.Ct. 853 (1993) 37

Hill v. State, 369 A.2d 98 (Md. Ct.
Spec. App. 1977) 25

Hurtado v. California, 110 U.S. 516
(1884) 21

Irvine v. California, 347 U.S. 128
(1954) 33

Johnson v. Mississippi, 486 U.S. 578
(1988) 37

Jones v. United States, 463 U.S. 354
(1983) 14, 31

Lackey v. State, 615 So. 2d 145 (Ala. Ct. App. 1982) 24

Leland v. Oregon, 343 U.S. 790 (1952) 27, 40

Maggio v. Fulford, 462 U.S. 111 (1983) 41

Mathews v. Eldridge, 424 U.S. 319 (1976) 26

McCleskey v. Zant, 499 U.S. 467 (1991) 30

Medina v. California, 505 U.S.437, 112 S.Ct. 2572 (1992) . . . . . 12, 13, 19, 20, 22 . . . . . 23, 26, 32, 34, 35, 41

Mooney v. Holohan, 294 U.S. 103 (1935) 20

Murray v. Giarratano, 492 U.S. 1 (1989) 37

O'Neal v. McAninch, __ U.S. __, 115 S. Ct. 992 (1994) 30

Ohio v. Akron Reprod. Health Center, 497 U.S. 502 (1990) 22, 25, 28, 34

Parke v. Raley, __ U.S. __, 113 S. Ct. 517 (1992) 32, 33

Pate v. Robinson, 383 U.S. 375 (1966) 13

Patterson v. New York, 432 U.S. 197 (1977) 19, 26, 27, 32, 40

Ponzi v. Fessendon, 258 U.S. 254 (1922) 30

Riggins v. Nevada, 504 U.S. 127 (1992) 27

Rivera v. Minnich, 483 U.S. 574 (1987) 28

Rochin v. California, 342 U.S. 165 (1952) 20, 21

Romano v. Oklahoma, 512 U.S. __, 114 S.Ct. 2004 (1994) 37

Santosky v. Kramer, 455 U.S. 745 (1982) 25, 41

Schad v. Arizona, 501 U.S. 624 (1991) 28

Schneiderman v. United States, 320 U.S. 118 (1943) 26

Snyder v. Massachusetts, 291 U.S. 97 (1934) 27, 39

Speiser v. Randall, 357 U.S. 513 (1958) 27

State v. Clark, 546 S.W.2d 455 (Mo. 1977) 24

State v. Costa, 613 P.2d 1359 (Kan. 1980) 24

State v. Lara, 880 P.2d 1124 (Ariz. Ct. App. 1994) 24

State v. Lewis, 584 A.2d 622 (Me. 1990) 24

State v. Potter, 712 P.2d 668 (Idaho 1985) 24

State v. Powers, 537 P.2d 1369 (Idaho 1975) 24

Thomas v. Hampton, 583 P.2d 506 (Okla. 1978) 35

Thomas v. Keohane, No. 94-6615, 1995 U.S. LEXIS 8315 (November 29, 1995) 41

United States v. Lovasco, 431 U.S. 783 (1977) 20

Wallace v. State, 486 N.E.2d 445 (Ind. 1985) 24

In Re Winship, 397 U.S. 358 (1970) 19, 25

Woodby v. INS, 385 U.S. 276 (1966) 26

STATUTES

Okla.Stat.tit. 21, § 701.7 1

50 Pa. Cons. Stat. § 7403(a) (1983) 23

Conn. Gen. Stat. § 54-56d (b) (1981) 23

D.C. Code Ann. § 24-301 (Supp. 1995) 24

Ky. Rev. Stat. Ann. § 504.100 (Supp. 1994) 24

N.C. Gen. Stat. § 15A-1002 (1994) 24

Mich. Comp. Laws § 330.2020
(Supp. 1995) 24

Mont. Code Ann. § 46-14-221
(Supp. 1995) 24

Neb. Rev. Stat. § 29-1823
(1989) 24

N.C. Gen. Stat. § 15A-1002
(1994) 24

Okla. Stat. tit. 22, § 1175.1
(Supp. 1992) 14

Okla. Stat. tit. 22, § 1175.2
(1991) 14, 31

Okla. Stat. tit. 22, § 1175.3
(Supp. 1993) 15

Okla. Stat. tit. 22, § 1175.4
(1991) 16

Okla. Stat. tit. 22, § 1175.5
(1991) 16

Okla. Stat. tit. 22, § 1175.6
(1991) 17

Or. Rev. Stat. § 161.370
(1993) 24

R.I. Gen. Laws § 40.1-5.3-3
(1993) 23

IN THE SUPREME COURT
OF THE UNITED STATES

BYRON KEITH COOPER,	)	
Petitioner,	)	
v.	)	**Case No. 95-5207**
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

STATEMENT OF THE CASE

Petitioner, Byron Keith Cooper, was charged on December 4, 1989 with first degree murder for the stabbing death of Harold Sheppard during the commission of a burglary in violation of Okla.Stat.tit. 21, § 701.7 (1991) in Case No. CF-82-5084 in the District Court of Oklahoma County before the Honorable Richard W. Freeman, District Judge. Petitioner was represented by counsel. The jury returned a verdict of guilty and, after a sentencing stage proceeding, found the existence of five (5) aggravating circumstances: that Petitioner had previously been convicted of a felony involving violence; that the murder was committed to avoid arrest or lawful prosecution; that the murder was especially heinous, atrocious, or cruel; that the murder was committed by one serving a term of imprisonment; and the existence of a probability that Petitioner would pose a continuing threat to society. The jury then recommended a sentence of death. The trial court

sentenced Petitioner in accordance with the jury's verdict.

From this Judgment and Sentence, Petitioner perfected his appeal to the Oklahoma Court of Criminal Appeals. On January 10, 1995, the Oklahoma Court of Criminal Appeals issued an opinion affirming Petitioner's conviction in Cooper v. State, 889 P.2d 293 (Okla. Crim. App. 1995). Rehearing was denied February 13, 1995. On October 5, 1995, this Court granted certiorari review.

STATEMENT OF THE FACTS

On September 8, 1989, the body of Harold Sheppard was found in his home at Northeast 13th and Fonshill streets in Oklahoma City, Oklahoma (Tr. V 28). Based on interviews with people in the neighborhood, authorities estimated that Sheppard was stabbed to death September 4, 1989 (Tr. V 177). Petitioner became a suspect after using Mr. Sheppard's J.C.Penney card (Tr. V 171-172, 177). Petitioner initially admitted murdering Mr. Sheppard but later retracted the admission (Tr. VIII 111, 114-15). A watch and two cameras belonging to Mr. Sheppard were found in the home where Petitioner had been staying (Tr. V 224, 230-231). At Mr. Sheppard's house, authorities found Petitioner's fingerprints on a flashlight, a metal can, a watch case and a carton of cigarettes (Tr. VIII 35-38). Petitioner's prints were also found on the charge receipt he signed at the J.C. Penney store at Shepherd Mall (Tr. VIII 42, 45). A butcher knife was found in the kitchen of Mr. Sheppard's home. When treated with a chemical agent, the knife contained stains which were determined to be consistent with the presence of blood and marks which appeared someone

wiped the knife clean (Tr. VI 234-35, 244, 247).

HISTORICAL FACTS REGARDING COMPETENCY

In August of 1990, Petitioner's counsel filed an Application for Determination of Competency. The district court found that there was a doubt as to Petitioner's competency and issued an order directing that Petitioner be examined in the county jail to determine competency to stand trial (Record 336-37, 344-45).

On August 27, 1990, a post-examination competency hearing was scheduled in the District Court of Oklahoma County. While there is no transcript or record of a hearing, an order was entered reciting that a hearing was held and there was a finding of incompetency on that date. Petitioner was committed to Eastern State Hospital for further evaluation and treatment.

The parties appeared for a post-examination competency hearing on December 20, 1990, after Petitioner's return from Eastern State Hospital. The defendant called Dr. Edith King, a clinical psychologist who had received an order to examine Petitioner Cooper on August 8, 1990 (Transcript of Competency Hearing of December 20, 1990 and January 18, 1991, hereinafter "C.H.I" 4). Dr. King had examined Petitioner in the Oklahoma County Jail for "close to an hour" prior to Petitioner's commitment to Eastern State Hospital (C.H.I 12).

At the time of Dr. King's examination, Petitioner did not answer the required statutory questions to her satisfaction.

Petitioner said he was charged with "burglary or kidnapping or something". He denied that he was charged with murder, stating that his attorney had "said something about it" but that he was "only kidding" (C.H.I 5-6). Petitioner did not speak in a rational manner and was unable or unwilling to answer specific questions.

Dr. King's opinion was Petitioner was not able to communicate with his attorney at that time. She was of the opinion that he was displaying a thought disorder and possibly auditory hallucinations that would be treatable within a reasonable length of time (C.H.I 6-7). Dr. King considered Petitioner to be mentally disturbed and a danger to himself or others (C.H.I 8-9).

Dr. King testified at the hearing that there were times in her experience when she has thought a defendant was malingering but recommended further evaluation "just to be safe". (C.H.I 15). In order to determine whether one is in fact malingering, Dr. King testified they had to be observed for a longer period of time (C.H.I 16).

Dr. King admitted that she did not do a diagnosis of Petitioner and that if she were doing the diagnosis, she would do it very differently from her initial observation (C.H.I 21). At the time of the competency hearing in December, Dr. King had not seen Petitioner since August (C.H.I 10).

Dr. King reviewed the report prepared by Dr. Jeanne Russell at Eastern State Hospital and testified that there was nothing about her examination of Petitioner back in August

that would cause her to disagree with Dr. Russell's conclusions (C.H.I 27). Based on her discussion with Petitioner prior to the hearing, Dr. King felt that Petitioner had improved since August. He no longer had a "wide-eyed look" and seemed to be oriented and in touch (C.H.I 27).

At the conclusion of Dr. King's testimony, the State contended that the defense had failed to meet their burden to show by clear and convincing evidence that Petitioner Cooper was incompetent on that day. The prosecutor, however, asked the court to reserve any ruling until the State's psychologist testified (C.H.I 30-31).

The hearing continued on January 18, 1991, and the State presented the testimony of Dr. Jeanne Russell, a forensic psychologist working for Eastern State Hospital. Dr. Russell had a doctorate in counselling psychology and had approximately 15 years with the Department of Corrections (C.H.I 34).

Dr. Russell conducted her first interview of Petitioner Cooper on November 16, 1990 after Petitioner's admittance on August 28, 1990 (C.H.I 54). Dr. Russell's evaluation took a total of six hours including review of records and observation of Petitioner (C.H.I 99). Cooper denied knowing what his charges were, what his birthdate was, who his attorney what his role was. Petitioner told Dr. Russell about an invisible friend that he had and when she pressed him for more information, he declined to give it (C.H.I 38).

Dr. Russell reviewed the hospital records, talked with the staff who worked with Petitioner on a daily basis, and talked

with employees of the Department of Corrections where he was incarcerated prior to his current charges to look for any history of mental illness and observed him. She determined that he did not have a history of mental illness or a history of hallucinations or delusions (C.H.I 39).

Dr. Russell was of the opinion that Petitioner had more knowledge of his defense than he was telling her (C.H. I 40). On at least four occasions he expressed an understanding of the courtroom procedures, and stated that he knew what his charges were and that he was aware of what the consequences could be (C.H. I 41). He also had expressed to staff an interest in a plea of not guilty by reason of insanity (C.H.I 41). On October 10, Cooper stated, "You're wasting your time going over courtroom proceedings with me. I know them. I've already spent 10 calendar years behind bars" (C.H.I 41). Petitioner would not discuss his charges with staff but told one of his peers, "I've got nothing to lose, I've already got two murder raps on me". (C.H.I 58). On October 10, 1990, Petitioner stated that he was willing to discuss his charges and demonstrated an understanding of courtroom procedures. He stated he wanted to return to stand trial (C.H.I 59).

Dr. Russell's opinion was that Petitioner was able to appreciate the nature of the charges against him and could consult and assist his attorney in his defense (C.H.I 43-44). Dr. Russell did not believe Petitioner was mentally ill and was of the opinion that he was a danger due to his past behavior; not his mental state (C.H.I 44-45).

Dr. Russell began to get suspicious of Petitioner when he

did not know his date of birth (C.H.I 73). Petitioner said he used all kinds of drugs including "acid, weed, mushrooms, paints, cocaine, crank and valium" (C.H.I 78).

Dr. Russell's opinion was Petitioner was malingering. Her conclusion was based on the overall interview and review of records, not one particular set of answers (C.H.I 88).

Based on the testimony presented at the hearing, the district court found Petitioner competent to stand trial (C.H.I 101).

Over a year later, Petitioner's counsel again raised the issue of incompetence. Counsel stated that he was concerned about Petitioner's behavior in the courtroom and in the county jail (App. 3). Counsel admitted and reiterated at that time that Petitioner might be faking (App. 4). The district court refused to revisit the competency issue at that time (App. 6).

On the first day of trial, Petitioner again exhibited what was termed strange behavior. He refused to change from his orange jail coveralls because his trial clothes were "burning him" (Transcript of Pre-Trial Motions and Competency Hearing May 4 and 5, 1992, hereinafter "C.H.II" 3). He appeared with his right hand bandaged and had a large bandage on his neck (C.H.II 4).

Tony Albertson, a jail deputy, had escorted Petitioner to preliminary hearing a month earlier. At that time, Mr. Albertson spent about an hour with Petitioner. They had

conversed and Petitioner did not have any difficulty understanding what was going on around him (C.H.II 7-8).

Defense counsel reiterated that he had previously thought Petitioner was malingering and might still feel the same way (C.H. II 26). However, two investigators from his office felt that Petitioner was incompetent as Petitioner was not communicating with them or with his attorney (C.H.II 26).

Based on representations by defense counsel, the court determined that another evaluation was necessary. Counsel waived the right to demand a jury trial, secured a psychiatrist to examine Petitioner and began presenting witnesses that afternoon (C.H. II 36, 41).

Petitioner testified that his attorney, Bob Mildfelt, was trying to kill him (C.H.II 42). Petitioner refused to allow his attorney to stand close to him (C.H.II 44). Petitioner talked about a spirit named "Noryb"[1] who advised him about the charges against him. Petitioner agreed to let the judge talk to Noryb and after speaking unintelligibly, reported that Noryb would not talk to him (C.H.II 50).

The defense presented several inmates from the Oklahoma County Jail who testified that they noticed Petitioner's behavior, including stirring his hands in the toilet in his cell (C.H.II 93-94, 105, 106, 116).

Randy Bush, an investigator with the Oklahoma County

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[1] "Noryb" is Petitioner's first name "Byron" in reverse, a fact either unnoticed or unmentioned by the witnesses and parties.

Public Defender's Office, testified that Petitioner would not communicate about the case with him (C.H.II 140).

Dr. Philip Murphy, a licensed clinical psychologist, examined Petitioner in the evening hours of May 4, 1992 (App. 10; C.H.II 189). Dr. Murphy reviewed the Eastern State Hospital records and noticed that a nurse had described Cooper as "world-class, first-class manipulator" (App. 10; C.H.II 190-191). Dr. Murphy testified that some part of Petitioner's behavior was due to malingering and that he was "attempting to look worse than he is" (C.H.II 193). Murphy thought Petitioner had a thought disorder and although Petitioner showed no structural problems in his thinking, Murphy thought him to be incompetent because he was "confused" and could not assist his attorney (App. 12-13, C.H.II 194).

Dr. Murphy was unable to tell whether Petitioner's apparent playing with feces was an effect of the disorder or part of the malingering (App. 16; C.H. II 201). Dr. Murphy admitted that part of Petitioner's actions were the product of malingering (App. 17; C.H.II 204, 227).

The State presented the testimony of jail employees. JoDon Clanton, a detention officer at the Oklahoma County Detention Center, had several conversations with Petitioner Cooper. They would discuss what happened that day or what was going on in the news or on television. Mr. Clanton had never been given reason to believe that Cooper did not know what was going on around him (C.H.II 152).

Charles Morehead testified that in the five months he had

worked at the Oklahoma County Jail there, he had interacted with Petitioner about twenty times and had never observed him to act in an unusual way (App. 28; C.H. II 246). When Mr. Morehead had talked with Petitioner earlier that same day, Petitioner had no trouble communicating with him. Morehead had an earlier discussion with Petitioner about a fight Petitioner had been in with another inmate. Petitioner told Morehead he and the other inmate had made up and everything was cool (App. 30-31; C.H.II 250).

Steve Carrell from the Oklahoma County Sheriff's Department had come into contact with Petitioner six to eight times. He had observed Cooper that week walking around, conversing with other inmates and drinking coffee. Mr. Carrell had never seen Petitioner act out of the ordinary (App. 34-34; C.H.II 256-257). They had a discussion about a fight Petitioner had been in and Petitioner was able to answer Carrell's questions without requiring them to be repeated (App. 35; C.H.II 257).

Assistant District Attorney John Jacobsen testified that Petitioner had filed two civil rights lawsuits, one in October of 1991 and one on January 30, 1992. They were handwritten pro se pleadings (C.H.II 167-173). J. Michael Hull, a forensic document examiner with the Oklahoma City Police Department, compared the handwriting on the federal court pleadings with known handwriting samples of Petitioner Cooper (C.H.II 184). He was of the opinion that the signatures were of common authorship (C.H.II 185).

Assistant District Attorney Brad Miller informed the court that as recently as nineteen days earlier, on April 15,

1992, Petitioner had coherently talked about his testimony in another criminal case in court (C.H. II 267). Petitioner had also written the trial judge a letter (Record 1089-1091). Dr. Murphy was of the opinion that Petitioner was malingering when he wrote the letter (C.H. II 239).

The court stated that he respected Dr. Murphy and did not dispute his diagnosis but that the defense had not met the burden of proving Petitioner's incompetency by clear and convincing evidence (App. 42-43; C.H.II 271-272).

When court resumed on May 5, 1992, counsel for Petitioner announced not ready for trial because his client was not communicating with him. The trial court overruled defense counsel and the trial began (App. 44; C.H.II 9-10).

During trial, the subject of Petitioner's competency arose again. Deputy William Grimsley noticed Petitioner had something in his hand that "looked like candy" and there was a heavy odor of feces in the area (Transcript of Trial Proceeding, Volume VIII, hereinafter referred to as "Tr. VIII" 135). The court ordered a recess and directed the deputies to clean Petitioner up and bring him back down to court (Tr. VIII 137). Deputy Grimsley testified that the material extracted from Petitioner's hand had an odor of human feces to it (Tr. VIII 138). After Petitioner threw up in his cell, he put his own bandage back on his hand and returned to court (Tr. VIII 139-141).

Defense counsel moved for a mistrial and asked that an independent expert be appointed to advise the court as to Petitioner's competency (Tr. VIII 142). The court overruled

the motion and the trial proceeded.

SUMMARY OF THE ARGUMENT

In 1980, the State of Oklahoma adopted a set of statutes to govern procedures for determining a criminal defendant's competency to stand trial. Okla.Stat.tit. 22, § 1175.4 (1991) provides that once it is determined there is doubt as to the defendant's competency, a defendant is evaluated. Thereafter, a post-examination competency hearing is held. At that hearing, the court shall determine, by clear and convincing evidence, if the person is incompetent. The party who raises the issues shall bear the burden.

Petitioner claims the clear and convincing standard adopted by Oklahoma and utilized in this case violates due process as it allows the trial of a person "more likely than not incompetent". That a factually incompetent defendant shall not be subjected to trial is a principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental". Medina v. California, 505 U.S. 437, 112 S.Ct 2572 (1992).

Every defendant is presumed competent to stand trial and while this Court has determined that incompetent defendants should not proceed to trial, the Court has not allocated to the states the manner in which incompetency is to be determined. States are free to adopt their own standards of proof consistent with their own concepts of public policy and fairness.

Although due process requires basic procedural

safeguards be observed, balancing of society's interest against those of the accused has been left to the legislative branch. The clear and convincing intermediate level of proof adopted by the Oklahoma Legislature is sufficient to protect the values of society and is an accurate reflection of how the risk of error should be distributed between the litigants.

I.

THE CONSTITUTION PROTECTS A CRIMINAL DEFENDANT FROM BEING TRIED WHILE INCOMPETENT; THE DUE PROCESS PROVIDED TO DETERMINE INCOMPETENCE IS LEFT TO THE STATES.

At the core of our criminal justice system is a presumption that every defendant is competent to stand trial. Medina v. California, 505 U.S. 437, 112 S.Ct. 2572 (1992). It is only when a defendant's mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, or to assist in preparing his defense, that he is exempted from being tried. Drope v. Missouri, 420 U.S. 162, 171 (1975), Pate v. Robinson, 383 U.S. 375 (1966). While this Court has determined that incompetent defendants should not proceed to trial, it has not directed the states as to the manner in which to determine incompetency. This Court has held the allocation of the burden of proof to a criminal defendant to prove incompetence does not violate due process. Medina, 112 S.Ct. at 2577.

A defendant not only has a right not to be tried while incompetent, he also has a right not to be committed without due process. It is clear that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection". Jones v. United States, 463 U.S. 354, 361 (1983), quoting Addington v. Texas, 441 U.S. 418, 425 (1979). Therefore, a state must have a constitutionally adequate purpose for the confinement. Jones, 463 U.S. at 361.

Oklahoma has balanced these concerns in the adoption of its competency statutes. Okla.Stat.tit. 22, § 1175.1 (Supp. 1992) defines competency as "the present ability of a person arrested for or charged with a crime to understand the nature of the charges and proceedings brought against him, and to effectively and rationally assist in his defense".

Under Oklahoma law, the question of the incompetence of a person may be raised by the person, the defense attorney, or the district attorney, by an application for determination of competency. The court may also initiate a competency determination on its own motion and direct the processing of the application. Okla.Stat.tit. 22, § 1175.2(A).

The application shall allege that the person is incompetent to undergo further proceedings, and shall state facts sufficient to raise a doubt as to the competency of the person. Okla.Stat. tit. 22, § 1175.2 (1991). The court shall hold a hearing on the application and, if the court finds there is a doubt as to the competency of the defendant, the court shall order the person to be examined by "doctors or

appropriate technicians". Okla.Stat. tit. 22, § 1175.3 (Supp. 1993).

These medical health professions are required to answer a series of five questions:

1. Is this person able to appreciate the nature of the charges against him?

2. Is this person able to consult with his lawyer and rationally assist in the preparation of his defense?

3. If the answer to question 1 or 2 is no, can the person attain competency within a reasonable time if provided with a course of treatment, therapy or training?

4. Is the person a mentally ill person or a person requiring treatment as defined by Section 3 of Title 43A?

5. If the person were released without treatment, therapy or training, would he probably pose a significant threat to the life or safety of himself or others?
Okla.Stat.tit. 22, § 1175.3 (Supp. 1993).

After these determinations are made, a hearing on the competency of the person shall be held. The court, at the hearing on the application, shall determine, by clear and convincing evidence, if the person is incompetent. If incompetency is found, the criminal proceedings are enjoined and remain enjoined absent a future finding that competency has been restored.

Oklahoma statutes provide extensive protections for the criminal defendant at this hearing. The person whose competency is in question shall have the right to be present at the hearing and shall have the right to cross-examine witnesses. No statement made by the accused shall be used against him in any criminal proceeding then filed or filed in the future but may only be used for impeachment. The accused may demand a jury trial. Okla.Stat.tit. 22, § 1175.4 (1991). The jury, or the court shall answer the following questions:

1. Is the person incompetent to undergo further criminal proceedings at that time? If the answer is no, criminal proceedings shall be resumed. If the answer is yes, the following question shall be answered.

2. Can the incompetency of the person be corrected within a reasonable period of time, as defined by the court, by treatment, therapy or training? If the answer is yes, the court shall make the appropriate order. If the answer is no, the following questions shall be answered.

3. Is the person mentally ill, mentally retarded or a person requiring treatment as defined by Section 3 of Title 43A?

4. Is the person a threat to the safety of himself or others if released?

Okla.Stat.tit. 22, § 1175.5 (1991).

If the person is found to be competent, the criminal

proceedings shall be resumed. If the person is found to be incompetent but capable of achieving competency, the court shall remand the person to the Department of Mental Health, the Department of Human Services, other appropriate state agencies or a private care provider for appropriate treatment, therapy, or training. If the person is found to be incompetent, unable of achieving competency, and in need of treatment, the court shall order treatment and suspend the criminal proceeding. If the person is incompetent and unable of achieving competency but does not require treatment and is not a threat to himself or society, the court shall remand the person to the Department of Human Services for assistance. That agency shall make periodic reports to the court as to the status and activities of the person.

Okla.Stat.tit. 22, § 1175.6 (1991).

Oklahoma's competency statutes make specific provisions for those arrested with a criminal offense which is punishable by death, life imprisonment or life imprisonment without parole, who are found to be incompetent. Section 1175.6 (B) provides that those persons are subject to being placed in a maximum security ward of the mental health facility designated by the Department of Mental Health and Substance Abuse services until the person is adjudicated to be competent or is adjudicated no longer to be a threat to any other person.

This Court has said the states must "observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial". Drope, 420 U.S. at 172. This Court has not stated what those

procedures must entail. Oklahoma's procedures are specifically designed to afford the accused due process of law and to ensure that he is capable of making a rational defense prior to being tried for the crime for which he is accused while at the same time protecting the state's inherent interest in the orderly progression of its judicial process.

Petitioner claims Oklahoma's standard of "clear and convincing evidence" is so high that it fails to protect a defendant who is "more likely than not" incompetent. This Court has not held, and the Constitution does not provide, that a defendant who is "more likely than not" incompetent may not be tried. The exemption from trial only applies to those defendants who are in fact incompetent. In Dusky v. United States, 362 U.S. 402 (1960), this Court reiterated the standard which has been followed since and which the Oklahoma court adheres to, that "the test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him". Notably, this standard is not whether the defendant, more likely than not, has sufficient present ability to consult with the lawyer or whether the defendant, more likely than not, has a rational as well as factual understanding of the proceedings against him.

"Clear and convincing" is a intermediate level burden designed to balance the interests of the parties - mere preponderance establishes only a likelihood with limited reliability in the result. See Addington v. Texas, 441 U.S. 418, 423 (1979). In Addington, this Court noted that there are three standards or levels of proof for different types of

cases. At one end is the typical civil case involving a monetary dispute between parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error.

On the other hand, the interest of the defendant in a criminal case are so great that they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. This is accomplished by requiring that the state prove the guilt of an accused beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970).

The clear and convincing standard, however, is an intermediate standard typically used in those civil cases where the interests at stake are deemed to be more substantial than mere loss of money. Addington, 441 U.S. at 424. Although there is no empirical data on how jurors understand these differing standards of proof, "the standard of proof [at a minimum] reflects the value society places on individual liberty". Addington, 441 U.S. at 425.

In Medina v. California, 112 S.Ct. at 2577, this Court was unable to say that allocation of the burden of proof to a criminal defendant to prove incompetence "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Patterson, 432 U.S. at 202. The court noted that there is no settled tradition on the proper allocation of the burden of proof in a proceeding to determine competence. The Court held that once a state provides a defendant access to procedures for

making a competency evaluation, there is no basis for holding that due process further requires the state to assume the burden of vindicating the defendant's constitutional rights by persuading the trier of fact that the defendant is competent to stand trial. Medina, 112 S.Ct. at 2579. Medina need not be extended any further than its own rationale to come to the conclusion that it is not unconstitutional to require the defendant to bear the burden of proving incompetency by clear and convincing evidence.

"Due Process" has been defined in a variety of ways depending upon the facts and circumstances of each particular case. It is clear that "beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation". Medina, 112 S.Ct. at 2576. The category of infractions that violate "fundamental fairness" has been defined very narrowly. Id. In United States v. Lovasco, 431 U.S. 783, 790 (1977), this Court held:

> Judges are not free, in defining 'due process' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function' Rochin v. California, 342 U.S. 165, 170, [96 L.Ed 183, 72 S.Ct. 205, 25 ALR2d 1396] (1952) . . . [They] are to determine only whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' Mooney v. Holohan, 294 U.S. 103, 112 [79 L.Ed. 791, 55 S.Ct. 240, 98 ALR 406] (1935), and which defines 'the community's sense of fair play and decency,' Rochin v. California, supra, at 173 [96 L.Ed 183, 72 S.Ct. 205, 25 ALR2D 1396]

As Oklahoma's statute protects the constitutional right of a person not to be tried while incompetent, it does not violate fundamental concepts of justice or the community's senses of fair play and decency and is not violative of the Due Process Clause of the United States Constitution.

A.

THE INCREASED PROTECTIONS AFFORDED CRIMINAL DEFENDANTS IN COMPETENCY PROCEEDINGS FAVOR A STANDARD OF PROOF HIGHER THAN MERE PREPONDERANCE.

Petitioner argues that the common law demanded and applied a preponderance of the evidence burden of proof for determining competency to stand trial. If true, however, this does not compel such a result today. In Burnham v. Superior Court of California, 495 U.S. 604 (1990), this Court noted that a process of law which can show the sanction of settled usage both in England and in this county must be taken to be due process of law. However, "it by no means follows that nothing else can be due process of law". Burnham, 495 U.S. at 619, quoting Hurtado v. California, 110 U.S. 516 (1884). To hold that such a characteristic is essential to due process would be to "deny every quality of the law but its age, and to render it incapable of progress or improvement". "It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians". Id.

The developments of today's legal system do not dictate that such a "preponderance of the evidence" standard be in place today. In today's criminal justice system, criminal defendants are represented by attorneys skilled in the practice of criminal law and are provided with psychiatric experts, funded at the expense of the state. See Ake v. Oklahoma, 470 U.S. 68 (1985). These safeguards, which were not in existence at common law, serve to protect the interest of a defendant not to be tried while incompetent. Thus, the "settled tradition" of the past, if it exists, is no longer controlling.

This Court recognized in Ohio v. Akron Reproduction, 497 U.S. at 517-518, that the implementing of certain safeguards can justify a different standard of proof. In Akron, the minor seeking an abortion was assisted in the courtroom by an attorney as well as a guardian ad litem. These factors were found to contribute to the higher standard of proof placed on the minor. This Court also realized in Medina that once a competency hearing is held, the defendant is entitled to the assistance of counsel and psychiatric evidence is brought to bear on the questions of the defendant's mental condition. The Court noted:

> Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant's inability to assist counsel can, in and of itself, constituted probative evidence of incompetence.

Medina, 112 S.Ct. at 2580. States may take such factors into account in making judgments as to the allocation of the burden of proof. Id.

Similarly, the fact that psychiatry is not an exact science

does not demand that the state bear the burden of proof. Id. "The Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused". Id. It is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial. Id.

Legislatures, like courts, are free to depart from common law concepts, adjusting outmoded rules of law to modern conditions. Fisher v. United States, 328 U.S. 463, 476 (1946). See also Burnham, 495 U.S. at 619. The trend today is toward establishing a standard of "clear and convincing" rather than "preponderance of the evidence". Oklahoma's statute specifically providing that the burden of proof is by clear and convincing evidence became effective June 25, 1980. Pennsylvania selected the "clear and convincing standard" in 1976[2] while Connecticut adopted the clear and convincing standard in 1980[3] and Rhode Island followed in 1993[4].

Other states have adopted a variety of procedures to determine whether a criminal defendant is incompetent. Alabama requires that the defendant bear the burden of production that he is incompetent before the burden shifts to the State to prove the defendant competent by clear and

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[2]50 Pa. Cons. Stat. §7403(a) (1983)

[3]Conn. Gen. Stat. § 54-56d (b) (1981)

[4]R.I. Gen. Laws § 40.1-5.3-3 (1993).

convincing evidence.[5] Missouri[6], Idaho[7], and Indiana[8] require that the court be "satisfied" as to incompetence, suggesting a higher quantum of proof than mere likelihood. Kentucky[9], Maine[10], Michigan[11], Montana[12], North Carolina[13], Oregon[14] and Nebraska[15] require the issue of incompetence to be "determined" by the court but do not provide for a specific standard of proof. The District of Columbia[16], Kansas[17] and Arizona[18] require their

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[5]Lackey v. State, 615 So.2d 145 (Ala. Ct. App. 1982)

[6]State v. Clark, 546 S.W.2d 455 (Mo. 1977)

[7]State v. Potter, 712 P.2d 668 (Idaho 1985); State v. Powers, 537 P.2d 1369 (Idaho 1975).

[8]Wallace v. State, 486 N.E.2d 445 (Ind. 1985).

[9] Ky. Rev. Stat. Ann. § 504.100 (Supp. 1994)

[10]State v. Lewis, 584 A.2d 622 (Me. 1990)

[11]Mich. Comp. Laws § 330.2020 (Supp. 1995)

[12]Mont. Code Ann. § 46-14-221 (Supp. 1995)

[13]N.C. Gen. Stat. § 15A-1002 (1994)

[14]Or. Rev. Stat § 161.370 (1993)

[15]Neb. Rev. Stat. § 29-1823 (1989)

[16]D.C. Code Ann. § 24-301 (Supp. 1995)

[17]State v. Costa, 613 P.2d 1359 (Kan. 1980)

[18]State v. Lara, 880 P.2d 1124 (Ariz. Ct. App. 1994)

decisions regarding incompetency to be based on the "sound discretion of the trial judge", providing for no specific standard of proof. The State of Maryland requires that competence must be found beyond a reasonable doubt.[19]

B.

OKLAHOMA'S CLEAR AND CONVINCING STANDARD ALLOCATES THE RISK OF ERROR TO REFLECT SOCIETAL VALUES.

Whether states have adopted their clear and convincing standards in light of Addington v. Texas, 441 U.S. 418 (1979) is not particularly relevant. What is clear is that this Court's holding in Addington supports such a standard. In Addington, a case involving civil proceedings for involuntary commitment, this Court held the function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication". Addington, 441 U.S. at 423, quoting In re Winship, 397 U.S. 358, 370 (1970). This standard serves to allocate the risk of error between the litigants and to indicate the value society places on individual liberty.

This Court has used the "clear and convincing" standard where the interest at stake are deemed to be more substantial then mere loss of money. For example, this standard is required in civil commitment proceedings, Addington, 441 U.S. at 324; procedures for an unmarried, unemancipated minor who seeks to obtain an abortion without parental

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[19]Hill v. State, 369 A.2d 98 (Md. Ct. Spec. App. 1977)

notice or consent, Ohio v. Akron Reprod., 497 U.S. at 515; parental rights termination proceedings, Santosky v. Kramer, 455 U.S. 745 (1982); proceedings to withdraw life-sustaining treatment, Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990); deportation proceedings, Woodby v. INS, 385 U.S. 276 (1966); denaturalization proceedings, Schneiderman v. United States, 320 U.S. 118 (1943); and to confine an insane criminal defendant beyond his criminal sentence, Foucha v. Louisiana, 504 U.S. 71 (1992).

In upholding a "clear and convincing standard" in Cruzan, 497 U.S. at 280, this Court recognized the interests of the state to seek to protect life and noted that the standard of proof served as "a societal judgment about how the risk of error should be distributed between the litigants". The individual interests at stake in the state proceeding were both "particularly important" and "more substantial than mere loss of money".

In Medina, 112 S.Ct. at 2576, this Court adopted the analytical approach set forth in Patterson v. New York, 432 U.S. 197 (1977) and applied a more narrow inquiry than the balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976). This Court held in Patterson that the burden of proof should be equal to the risk. In the context of competency proceedings, the burden of having the defendant carry a clear and convincing burden serves the purpose of placing the burden on the party who has access to the most information. In Gomez v. Toledo, 446 U.S. 635, 641 (1980) this Court allocated the burden of pleading good faith qualified immunity in a civil rights action against a public official to the defendant based in part on the conclusion that "whether such immunity has been established depends on facts peculiarly within the knowledge and control of the

defendant".

A state's decision on where to place the burden does not violate due process unless "it offends some principle of justice so rooted in the traditions and conscience of our peoples to be ranked as fundamental". Patterson, 432 U.S. at 201-202, quoting Speiser v. Randall, 357 U.S. 513, 523 (1958); Leland v. Oregon, 343 U.S. 790, 798 (1952); Snyder v. Massachusetts, 291 U.S. 97, 05 (1934).

The risk of a decision which does not comport with societal values is not greater but rather, is less likely with the use of a clear and convincing standard. There are many variables which come into play when assessing a person's competency. The one common factor, however, is that where the defendant is the party claiming to be incompetent he has exclusive control over his outward manifestations.

If a defendant is truly incompetent, a clear and convincing standard should not be difficult to meet, particularly where such incompetence is based upon organic brain disease, capable of medical proof, or severe retardation, usually evidenced historically. Rather, this standard serves to ward off abuses in the system. The concept of malingering is a common one amongst those who claim to be incompetent. The defendant controls the arena as he has exclusive control of all external behaviorisms. Generally, a defendant also controls the information supplied to mental health professionals which ultimately results in expert findings. The State cannot compel answers to a personality inventory, descriptions of inkblots, completion of phrases, drawing of figures, or even speech itself from an unwilling defendant.[20]

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[20]This Court has also held that a state may not force a defendant to take psychotropic drugs. Riggins v. Nevada, 504 U.S. 127 (1992).

This Court has found the availability of attorneys and expert assistance a significant factor for establishing a clear and convincing standards on minors to prove maturity or best interests in abortion cases. Ohio v. Akron Reprod. Health Center, 497 U.S. 502 (1990). This standard better accommodates the possibility that a defendant may be malingering. With a preponderance standard,[21] malingering is more difficult to differentiate. When a defendant simply has to prove that he is more likely than not incompetent, that defendant who is arguably incompetent may easily demonstrate signs shifting the degree of "proof" to 51 percent and thereby escape prosecution, temporarily or permanently. If, however, a higher standard is in place, the chances of manipulating the facts to result in an erroneous finding of incompetency are far less.

A clear and convincing standard also accommodates a defendant's interests should he later become incompetent. Oklahoma's statutory scheme provides an additional protection for criminal defendants as it provides that a determination may be initiated at any time during the criminal proceedings if the court has a doubt as to competency. Okla.Stat.tit. 22, § 1175.2(A) . This Court noted in Drope v. Missouri, 420 U.S. 162, 181, that even where a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. Thus, an

[21]Whenever the term "preponderance of the evidence" is used, it is generally preceded by the adjective "mere", an indication of the extremely low burden that concept entails. Schad v. Arizona, 501 U.S. 624, 642 (1991); Ohio v. Akron Reprod., 497 U.S. 502, 516 (1990); Rivera v. Minnich, 483 U.S. 574, 578 (1987); Addington, 441 U.S. at 423.

erroneous finding of competency, should one occur, would not be the final step but is merely a threshold finding.[22] The procedure of repeated evaluations was employed in this case as questions were raised regarding Petitioner's competency prior to and during trial. Even after Petitioner had been found to be competent to stand trial, Petitioner, on the day of trial, raised the issue again and was evaluated by another psychologist.

The uncertainly of psycho-science is also a factor which weighs in favor of a higher burden. As this Court recognized in Addington, 441 U.S. at 426-27:

> At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely not one for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the

[22]One would assume that in the case of a truly incompetent defendant, defense counsel would notice the signs early in the criminal proceedings and raise the issue immediately.

chances that inappropriate commitment will be ordered.

An erroneous finding of incompetency may prevent a trial from taking place at all or may postpone it for an indefinite period of time. The fact that a criminal trial may be forestalled or even delayed due to an erroneous finding of incompetency is not a factor to be taken lightly. This Court has recognized, in the context of speedy trial issues, that delay may work to a defendant's advantage. In Barker v. Wingo, 407 U.S. 514, 521 (1972), this Court noted that delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. See also Costello v. United States, 365 U.S. 265, 283 (1961) ("Government's proof made more difficult when a numbers of witnesses admitted their memories of details had dimmed with the passage of the years); Ponzi v. Fessendon, 258 U.S. 254 (1922) ("Delay in the trial of accused's persons greatly aids the guilty to escape because witnesses disappear, their memories become less accurate and time lessens the vigor of officials charged with the duty or prosecution").

This Court has also recognized the harm to the government through delays in bringing federal habeas corpus actions. When a habeas petitioner obtains a new trial, the government is put at a disadvantage through the 'erosion of memories' and the 'dispersion of witnesses" that occur over time. These delays diminish the chance of a reliable criminal adjudication on retrial. O'Neal v. McAninch, __ U.S. __, 115 S.Ct. 992 (1994); McCleskey v. Zant, 499 U.S. 467, 491 (1991). Public faith in the judicial system is

also eroded when trials are delayed by determinations of incompetency which are not supported by evidence which is clear and convincing.

The Government's interest in prosecuting criminals is enhanced by a clear and convincing standard of proof. Competency to stand trial is not an element of the offense with which a defendant is charged. Once a defendant is found competent to stand trial, all of the other protections that surround that trial remain, and the prosecution still must prove beyond a reasonable doubt every element of the crime with which the defendant has been charged. Furthermore, a determination that a defendant is competent to stand trial may be modified later if changed circumstances indicate the defendant is no longer or never was competent to stand trial. Okla.Stat. tit. 22, § 1175.2(A). This possibility arose during the criminal proceedings in this case and Petitioner was examined by another psychologist immediately prior to trial and a second hearing was conducted.

Moreover, under Oklahoma law, a defendant's competency may be raised not only by the defendant but also by the prosecution or the trial court. In instances where the issue of competency is raised by someone other than the defendant, the defendant has a right not to be committed even temporarily without due process. Jones, 463 U.S. at 361. The clear and convincing standard protects this right.

Addington requires clear and convincing evidence to support an involuntary commitment. If a defendant's psychological manifestations are such that he can meet a mere preponderance burden to enjoin a criminal trial but are below the level necessary for commitment, he will be in a legal limbo. Absent a finding of dangerousness, by clear and convincing evidence, the State is powerless to protect its citizens through either its mental health or judicial processes.

The State of Oklahoma should not be required to employ a standard of proof that may completely undercut efforts to further the legitimate interests of the State and the person whose competency is in question. "Due process does not require that every conceivable step be taken, at whatever costs, to eliminate the possibility of convicting an innocent person. Punishment of those found guilty by a jury, for example, is not forbidden merely because there is a remote possibility in some instances that an innocent person might go to jail". Patterson, 432 U.S. at 208. It is even more true in the context of competency proceedings, which do not involve criminal convictions, that due process does not require a standard so low that any defendant with potential signs of incompetence may meet it.

C.

THE CLEAR AND CONVINCING STANDARD IS NOT SO HIGH AS TO VIOLATE DUE PROCESS.

Presumptions carry great weight in the law, so great that even in the context of criminal trial proceedings, this Court has approved of state statutes which place burdens on criminal defendants to overcome presumptions. In Parke v. Raley, ___ U.S. ___ , 113 S.Ct. 517 (1992), a criminal defendant unsuccessfully contended that Kentucky's rule requiring that criminal defendant's may challenge prior convictions that form the basis of a current charge was unfair because it may be difficult to prove the invalidity of a conviction entered many years ago. The Parke Court quoted from Medina, 505 U.S. at 452, "The Due Process Clause does not, however, require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused". This Court realized

that when a defendant challenges the validity of a previous guilty plea, the government will "not invariably, or perhaps even usually" have superior access to evidence. "Indeed, when the plea was entered in another jurisdiction, the defendant may be the only witness who was actually present at the earlier proceeding. . . To the extent that the government fails to carry its burden due to the staleness or unavailability of evidence, of course, its legitimate interest in differentially punishing repeat offenders is compromised. In light of the relative position of the defendant and the prosection in recidivism proceedings, we cannot say that it is fundamentally unfair to place at least a burden of production on the defendant". Parke, 113 S.Ct at 524-525.

This logic supports Respondent's position that, because the bulk of the information regarding competency is in the hands of the defendant, it is not unfair to make him carry a middle level burden to demonstrate incompetence.

By asking this Court to find this burden violates Due Process, Petitioner is seeking to apply the Due Process Clause mechanistically. This Court cautioned against such in Irvine v. California, 347 US. 128 (1954) when it stated:

> Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the Due Process Clause judicial judgment is involved in an empiric process in the sense that results are not predetermined or mechanically ascertainable.
>
> The effort to imprison due process within tidy categories misconceives its nature and is a futile endeavor to save the judicial function from the pains of judicial judgment.

Those states which place the burden of proof on the prosecution have different statutory schemes than what is in place in Oklahoma. This Court made clear in Medina v. California, 112 S.Ct. at 2580, that placing the burden on the state is not constitutionally required. The fact that certain states provide a criminal defendant more protection than is constitutionally required does not compel this Court to **require** such.

Petitioner argues that the jury instruction defining "clear and convincing" exacts a higher burden than the plain language. The faulty instruction, however, was never used and there is no evidence in the record that it was even considered. Its mere existence had no bearing on the case whatsoever.

The instruction now in place reads, "[w]hen I say that a party has the burden of proving any proposition by clear and convincing evidence, I mean that you must be persuaded, considering all the evidence in the case, that the proposition on which the party has this burden of proof is highly probable and free from serious doubt. OUJI-Civil 3.2 (1993).

There is a distinction between "clear and convincing" and "clear, unequivocal and convincing". Addington, 441 U.S. at 431. This Court recognized the distinction made by the Ohio Supreme Court in Ohio v. Akron Reprod., 497 U.S. at 515:

> Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance,

> but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. **It does not mean clear and unequivocal".**[23]

The district judge, in applying the statutory language, stated in his finding that the defendant had not met his burden by clear and convincing evidence (App. 43). The court did not make a finding that the defendant had not met his burden by "clear, unequivocal and convincing" evidence.

There is nothing "fundamentally unfair" about placing the burden of proof on a criminal defendant to prove incompetence. This Court made this point clear in Medina. Likewise, there is nothing "fundamentally unfair" about providing for a "clear and convincing" standard of proof. It is the criminal defendant who is attempting to enjoin the criminal proceedings from taking place and it is he who should be held to a standard higher then a mere preponderance. Under Oklahoma law, the right to an injunction must be established by clear and convincing evidence. The Oklahoma courts also use the terms "with certainty", "clear", "clear and satisfactory" and that the right must be supported by the "clearest" proof. Thomas v. Hampton, 583 P.2d 506, 507 (Okla. 1978).

This case is an excellent example of why the Oklahoma Legislature set the standard higher than a "mere preponderance". Petitioner's attorneys first informed the trial court they were concerned about Petitioner's competency because he was "unable to comprehend his attorney or to meaningfully assist in the defense of his case" (Record 336). Petitioner's own expert had not seen him for

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[23]Alabama's statute uses the term "clear, unequivocal and convincing", a distinction from Oklahoma's statute.

four months at the time of the hearing. (C.H.I 10) The State's expert concluded Petitioner was competent (C.H.I 43-44). In the second hearing, evidence indicated Petitioner acted normally in other criminal proceedings and in situations which did not involve the murders. Even Petitioner's own psychologist was of the opinion Petitioner had an affective disorder and was malingering and Petitioner's own counsel perceived Petitioner as a malingerer (App. 17, C.H. II 26). The question in determining competency is not whether the defendant will assist in his defense, but whether he is capable of doing so. A clear and convincing evidence standard serves the purpose of winnowing out the evidence and distinguishing those defendants who will not assist from those who cannot.[24]

[24]No claim was made that Petitioner could not consult with his attorney on the appeal and no request has been made to the Oklahoma Department of Corrections to place Petitioner in a mental health facility since his incarceration on death row.

II.

ALTHOUGH CAPITAL CASES ARE DIFFERENT IN CERTAIN RESPECTS, THIS COURT HAS NOT PROVIDED THAT CAPITAL CASES ARE ENTITLED TO THEIR OWN SET OF PROCEDURAL RULES, INDEPENDENT OF PUNISHMENT ISSUES.

Lastly, Petitioner makes the "death is different" argument. While death is different to the extent that those cases in which capital punishment is rendered may require a heightened level of reliability, this does not mandate separate procedures for determining competency in capital cases. In Herrera v. Collins, 506 U.S. ___, 113 S.Ct. 853 (1993), this Court held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed.[25]

In Johnson v. Mississippi, 486 U.S. 578, 584 (1988), this Court noted the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "need for reliability in the determination that death is the appropriate punishment" in any capital case. This Court has also held that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. California v. Ramos, 463 U.S. 992, 998 (1983).

However, this Court has not held that capital cases

[25]This Court has also refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus. Murray v. Giarratano, 492 U.S. 1, 9 (1989).

require a separate rule of law. This Court has recognized that the states are bound by basic rules of law even as it relates to sentencing in capital cases. In Romano v. Oklahoma, 512 U.S. ___, 114 S.Ct. 2004 (1994), this Court held the Eight Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings. In Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), this Court articulated the standard for evaluating ambiguous jury instructions. In so doing, this Court stated:

> There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.

This statement is indicative of this Court's policy that while the qualitative difference of death from all other punishments requires a greater degree of scrutiny, it does not require separate procedural rules on allocations and degrees of proof burdens.

In the more egregious cases, particularly capital cases, the incentive to malinger or falsify symptoms increases proportionality, making the intermediate burden of proof even more appropriate.

Moreover, although this is a capital case, Oklahoma's competency statutes apply across the board from the least serious misdemeanor to the most serious felony. In many instances, the punishment for the crime committed is only a matter of days or weeks. A finding of incompetency, however, can result in a much lengthier period of deprivation of liberty. In those instances, a burden higher

than a "mere preponderance" works to the defendant's advantage.

III.

STATES ARE FREE TO ADOPT THEIR OWN STANDARDS OF PROOF CONSISTENT WITH THEIR OWN CONCEPTS OF PUBLIC POLICY AND FAIRNESS.

Under the concept of federalism, the states are free to tailor their own standards of proof as applicable to the particular interests at stake, bearing in mind that other protections afforded in the statute are a factor in determining the risks involved. In Addington, 441 U.S. at 431, this Court stated, "[t]he essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold". In Addington, this Court, while finding the "clear and convincing" standard constitutionally required, held that the determination of the precise burden equal to or greater than the "clear and convincing" standard was a matter of state law which was left to the Texas Supreme Court. Id. at 433. As statutes vary from state to state, procedures to protect due process must also be allowed to vary.

Competency is not an element of the offense which the state must prove in order to convict but is a threshold issue necessary to be resolved in order to prevent a violation of due process through conviction of a person incompetent to stand trial. While this Court has been diligent in protecting a defendant's due process rights, it has not, and should not ignore the power of the individual states to adopt their own procedures for determining incompetency.

For many years, this Court has shied away from

becoming a rulemaker for state courts. In Estelle v. McGuire, 502 U.S. 62 (1991), this Court stated:

> Cases in this Court have long proceeded on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial . . . But it has never been thought that such cases establish this Court as a rule making organ for the promulgation of state rules of criminal procedure.

States are free to regulate the procedure of their courts in accordance with the state's own concepts of policy and fairness unless in so doing it offends some "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". Snyder v. Massachusetts, 291 U.S 97, 105 (1934).

Procedures do not run afoul of the Fourteenth Amendment because another method may seem to be fairer or wiser or to give a surer promise of protection. Leland v. Oregon, 343 U.S. 790, 799 (1952). In Leland, the law at issue was an Oregon rule that required the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt. This Court noted that Oregon is the only state that requires such a standard of proof, although some twenty states place the burden on the accused to establish insanity by a preponderance of the evidence or some similar measure of persuasion. This Court noted that while there is a distinction between the two rules as to the quantum of proof required, there is no practical difference of such magnitude as to be significant in determining the constitutionality of the statute. In refusing to interfere with Oregon's determination of its policy with respect to the burden of proof in the issue of sanity, this Court stated:

> The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review.

Leland, 343 U.S. at 799.

As this Court noted in Patterson, 432 U.S. at 201:

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government [citation omitted] and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.

Even in those rare instances in which this Court has spoken with regard to a particular standard of proof, this Court has held that "determination of the precise burden . . . is a matter of state law properly left to state legislatures and state courts". Santosky v. Kramer, 455 U.S. at 769-770. Although due process has required that basic procedural safeguards be observed, balancing of society's interests against those of the accused has been left to the legislative branch. Medina, 112 S.Ct. at 2577. The

Oklahoma Legislature, consistent with due process, chose to adopt a clear and convincing standard of proof in determining competency. This Court recently reaffirmed that competency to stand trial is a factual issue. Thomas v. Keohane, No. 94-6615, 1995 U.S. LEXIS 8315 (November 29, 1995); Maggio v. Fulford, 462 U.S. 111, 117 (1983). In the context of habeas corpus proceedings, a finding of competency by a state court is entitled to a presumption of correctness in federal court. Such a finding is consistent with this Court's position of deference to state court findings on issues of incompetence.

It is not unreasonable for Oklahoma to conclude that society has more than a minimal concern with the outcome of competency proceedings. The State of Oklahoma has a great interest in assuring its citizens a fair and speedy trial, together with the presumption of competency which is historically based. Respondent asks this Court to protect the power of Oklahoma to do so by affirming the conviction below.

Respectfully submitted,

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